

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LEDA HEALTH CORPORATION,

Plaintiff,

v.

JAY ROBERT INSLEE et al.,

Defendant.

CASE NO. 2:24-cv-00871-DGE

ORDER ON MOTION FOR
PRELIMINARY INJUNCTION
(DKT. NO. 10), MOTION TO
DISMISS (DKT. NO. 30), AND
MOTION FOR EVIDENTIARY
HEARING (DKT. NO. 34)

I INTRODUCTION

This matter comes before the Court on Plaintiff's motion for a preliminary injunction (Dkt. No. 10) and Defendants' motion to dismiss for failure to state a claim (Dkt. No. 30). Defendants filed a response to Plaintiff's motion for injunctive relief (Dkt. No. 18), to which Plaintiff replied (Dkt. No. 29). Plaintiff subsequently filed a motion for an evidentiary hearing (Dkt. No. 34), to which Defendants responded (Dkt. No. 36), Plaintiff replied (Dkt. No. 39), and Defendant surreplied (Dkt. No. 40). Plaintiff then filed a response to Defendants' motion to dismiss (Dkt. No. 37), to which Defendant replied (Dkt. No. 41). Upon careful consideration of

1 the briefing filed by both parties, the Court concludes this matter is suitable for disposition
2 without oral argument. *See* LCR 7(b)(4); *United States v. State of Or.*, 913 F.2d 576, 582 (9th
3 Cir. 1990) (“[W]e have rejected any presumption in favor of evidentiary hearings[.]”).

4 The Court DENIES Plaintiff’s motion for a preliminary injunction and GRANTS
5 Defendants’ motion to dismiss for the reasons set forth below. Accordingly, Plaintiff’s motion
6 for an evidentiary hearing is DENIED as moot, and Defendants’ surreply is also moot.

7 II BACKGROUND

8 A. Factual Background

9 Leda Health is a company known for developing Early Evidence Kits (“EEKs”)—
10 products that allegedly enable sexual assault survivors to “self-collect and store evidence such as
11 DNA” if they are unable or unwilling to seek a traditional forensic medical examination. (Dkt.
12 No. 11 at 4.) Each EEK is branded with a unique barcode and contains an instruction manual on
13 DNA self-collection, diagnostic swabs, sterile water for swabbing dry areas, a prepaid FedEx bag
14 for shipping to an accredited partner lab, tamper-evident tape, plastic bags for storing clothing or
15 other relevant items, and an intake form for documenting the assault and chain of custody. (*Id.* at
16 6.) Leda sells its EEKs to companies or other entities with which it partners—including sorority
17 chapters on college campuses. (*Id.* at 5.) In 2022, Leda attempted to partner with the University
18 of Washington’s Kappa Delta sorority. (*Id.* at 4.)

19 On October 31, 2022, the Washington State Attorney General’s Office (AGO) issued
20 Leda a cease-and-desist notification. The letter directed Leda to “immediately cease and desist
21 from advertising, marketing, and sales to Washington consumers related to its ‘Early Evidence
22 Kits’ on the basis that Leda’s business practices related to these kits violated the Washington
23 Consumer Protection Act.” (Dkt. No 19-1 at 29.) The letter stated that “Leda’s claims regarding
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1 the admissibility of its at-home kits have the capacity to deceive a Washington consumer into
2 believing that its Early Evidence Kits have equivalent evidentiary value to a sexual assault
3 evidence kit (“SAEK”) administered by a medical professional.” (*Id.* at 30). The notice went on
4 to assert that the self-administered nature of Leda’s EEKs would predictably result in “numerous
5 barriers to admission as evidence, including on the basis of potential cross-contamination,
6 spoilation, and validity.” (*Id.*) It emphasized that, in Washington, exams by a trained Sexual
7 Assault Nurse Examiner (SANE) are “both free and routinely admissible.” (*Id.* at 31.) Thus, the
8 letter concluded that “Leda charging consumers for Early Evidence Kits despite the fact they are
9 unlikely to be admissible in a criminal court is an unfair and deceptive business practice” in
10 violation of the Washington Consumer Protection Act. (*Id.*)

11 Washington was not the first state to raise concerns about the emergence of at-home
12 sexual assault evidence collection kits. In 2019, Attorneys General from New York, Oklahoma,
13 Connecticut, Michigan, North Carolina, Hawaii, and Florida sent cease and desist notifications to
14 Leda’s precursor company, MeToo Kits. (*See* Dkt. No. 19-1 at 35–67.) In 2020, New
15 Hampshire’s legislature passed a bill establishing that “[n]o person shall sell or offer for sale in
16 the state of New Hampshire an over-the-counter rape test kit.” N.H. Rev. Stat. § 359-R:1.
17 Washington and Maryland¹ followed New Hampshire’s lead.

18 On January 24, 2023, Washington’s legislature first considered House Bill 1564: “An Act
19 Relating to prohibiting the sale of over-the-counter sexual assault kits.” (Dkt. No. 19-1 at 3.)
20 After multiple hearings, the bill was passed and went into effect on July 23, 2023. (Dkt. No. 30
21 at 13.) Several representatives from Leda Health testified at the hearings, asserting that Leda’s
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23 ¹ *See* Md. Code Ann. Com. Law § 14-4602 - Sale, offer for sale, or distribution of a self-
24 administered sexual assault kit prohibited.

1 kits are not misleading but rather intended to be an additive option for the approximately 70% of
 2 sexual assault victims who do not go to the hospital, or for those who go but are not able to see a
 3 SANE nurse. (Dkt. No. 13 at 181.) Leda further stated that while the company did not guarantee
 4 evidence admissibility, it had procedures in place to establish chain of custody and believed that
 5 evidence from its kits should be admissible in court. (*Id.*) Nevertheless, the legislature found
 6 that “[a]t-home sexual assault test kits create false expectations and harm the potential for
 7 successful investigations and prosecutions.” 2023 Wash. Sess. Laws, ch. 296, § 1. Thus, it
 8 concluded “[t]he sale of over-the-counter sexual assault kits may prevent survivors from
 9 receiving accurate information about their options and reporting processes; from obtaining
 10 access to appropriate and timely medical treatment and follow up; and from connecting to their
 11 community and other vital resources.” *Id.* Entitled “[o]ver-the-counter sexual assault kits” and
 12 codified at Washington Revised Code § 5.70.070, the act establishes that:

13 (2) A person may not sell, offer for sale, or otherwise make available a sexual assault kit:

- 14 a) That is marketed or otherwise presented as over-the-counter, at-home, or
 15 self-collected or in any manner that indicates that the sexual assault kit may
 16 be used for the collection of evidence of sexual assault other than by law
 enforcement or a health care provider; or
- 17 b) If the person intends, knows, or reasonably should know that the sexual
 18 assault kit will be used for the collection of evidence of sexual assault other
 than by law enforcement or a health care provider.

19 Wash. Rev. Code § 5.70.070(2). The statute defines “sexual assault kit” as “a product with
 20 which evidence of sexual assault is collected.” Wash. Rev. Code § 5.70.070(1). It further
 21 stipulates that a violation of the section constitutes “an unfair or deceptive act in trade or
 22 commerce and an unfair method of competition for the purpose of applying [Washington’s]
 23 consumer protection act.” Wash. Rev. Code § 5.70.070(3).

24 **B. Procedural History**

1 On June 17, 2024, Plaintiff filed a Complaint for declaratory and injunctive relief,
2 asserting that Washington Revised Code § 5.70.070 (hereinafter referred to as the Statute) is
3 unconstitutional on multiple counts in violation of 42 U.S.C. § 1983. (Dkt. No. 1.) The
4 Complaint claims that the Statute impermissibly regulates protected speech in violation of the
5 First and Fourteenth Amendments and is thus unconstitutional facially and as applied to Leda
6 Health. (*Id.* at 13–16.) The complaint further alleges that the Statute is void for overbreadth and
7 vagueness, both facially and as applied, and that it constitutes an unconstitutional bill of
8 attainder. (*Id.* at 16–20.) Shortly after filing the Complaint, Plaintiff brought the instant motion
9 for a preliminary injunction to prevent enforcement of the Statute on the same grounds. (Dkt.
10 No. 10.) Defendant then filed a motion to dismiss. (Dkt. No. 30).

11 III MOTION FOR PRELIMINARY INJUNCTION

12 A. Legal Standard

13 Governed by Federal Rule of Civil Procedure 65(a), a “preliminary injunction is an
14 extraordinary remedy never awarded as of right.” *Winter v. NRDC*, 555 U.S. 7, 24 (2008). To
15 obtain a preliminary injunction, a plaintiff “must establish that he is likely to succeed on the
16 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
17 balance of equities tips in his favor, and that an injunction is in the public interest.” *Id.* at 20.
18 “In each case, courts ‘must balance the competing claims of injury and must consider the effect
19 on each party of the granting or withholding of the requested relief.’” *Id.* at 24 (quoting *Amoco*
20 *Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542 (1987)). In so doing, a court must “pay
21 particular regard for the public consequences in employing the extraordinary remedy of
22 injunction.” *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). The Ninth
23 Circuit has adopted a sliding scale test for preliminary injunctions in which “a stronger showing
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of one element may offset a weaker showing of another.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Thus, “serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Id.* at 1135 (internal quotations removed).

B. Likelihood of Success on the Merits and Irreparable Harm

“The loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Accordingly, “[w]hen a party seeks a preliminary injunction on the basis of a potential First Amendment violation, the likelihood of success on the merits will often be the determinative factor.” *Joelner v. Vill. of Washington Park, Illinois*, 378 F.3d 613, 620 (7th Cir. 2004) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (“[T]o the extent that [a plaintiff] can establish a substantial likelihood of success on the merits of its First Amendment claim, it also has established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights”); *see also Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (“A colorable First Amendment claim is irreparable injury sufficient to merit the grant of relief”) (internal quotations omitted).

1. Facial First Amendment Claim

To mount a facial First Amendment challenge, a plaintiff must establish “that no set of circumstances exists under which the Act would be valid”—in other words, that the law in question is unconstitutional in all its applications. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Facial challenges are generally disfavored; “the Supreme Court has entertained facial freedom-of-expression challenges only against statutes that, by their terms, sought to regulate spoken words, or patently expressive or communicative conduct such as picketing or

1 handbilling.” *Roulette v. City of Seattle*, 97 F.3d 300, 303 (9th Cir. 1996) (internal citations
2 omitted).

3 Focusing on subsection (2)(a) of the Statute, Plaintiff alleges that law “does not ban the
4 sale of EEKs” but rather “regulates how and what companies like Leda Health can tell people
5 about their own products.” (Dkt. No. 10 at 9.) In this way, Plaintiff construes the Statute as a
6 “marketing ban” that “aims to eliminate a specific substantive message—that sexual assault kits
7 are available for use ‘over-the-counter, at-home or for personal self-collection’ without the
8 involvement of law enforcement or a health care provider.” (*Id.* at 12) (quoting Wash. Rev.
9 Code § 5.70.070(2)(a)). The Statute thereby functions as a content-based regulation on how a
10 sexual assault kit can be described and who can describe it, Plaintiff asserts. (*Id.* at 13) (quoting
11 *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (“[T]he First Amendment
12 stands against attempts to disfavor certain subjects or viewpoints [as well as] restrictions
13 distinguishing among different speakers, allowing speech by some but not others.”)). Because a
14 state cannot ban “the dissemination of truthful commercial information in order to prevent
15 members of the public from making bad decisions with the information,” the Statute is facially
16 unconstitutional, Plaintiff concludes. (*Id.* at 14) (quoting *Sorrell v. IMS Health Inc.*, 564 U.S.
17 552, 577 (2011)).

18 Defendant responds that Plaintiff “fundamentally mischaracterizes H.B. 1564 as banning
19 marketing or speech about over-the-counter sexual assault kits.” (Dkt. No. 18 at 8.) The Statute,
20 Defendant counters, does not implicate speech at all, but rather regulates the non-expressive
21 conduct of selling, offering for sale, or otherwise making available over the counter sexual
22 assault kits. (*Id.* at 16.) Defendant supports this argument by pointing out that there is nothing
23 in the Statute that prevents Plaintiff from “telling people that they can self-collect evidence” or
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1 “promoting the supposed benefits of EEKs or instructing people on how to use EEKs” or
2 “answering questions from people about EEKs.” (*Id.* at 17.) Instead, the law is only triggered if
3 a person sells, offers to sell, or otherwise distributes the products in question. (*Id.* at 17.)
4 Defendant further asserts that the Statute’s prohibition on offering to sell sexual assault kits does
5 not implicate the First Amendment because “[o]ffers to engage in illegal transactions are
6 categorically excluded from First Amendment protection.” *United States v. Williams*, 553 U.S.
7 285, 297 (2008)).

8 The Supreme Court is clear that “restrictions on protected expression are distinct from
9 restrictions on economic activity or, more generally, on nonexpressive conduct” and that “the
10 First Amendment does not prevent restrictions directed at commerce or conduct from imposing
11 incidental burdens on speech.” *Sorrell*, 564 U.S. at 567. Thus, to determine whether the Statute
12 operates as a restriction on “commerce or conduct” or whether it implicates protected speech, the
13 Court must construe the Statute. *See Williams*, 553 U.S. at 293 (“The first step . . . is to construe
14 the challenged statute.”).

15 “When interpreting state laws, a federal court is bound by the decision of the highest state
16 court.” *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990). “In the absence of such a decision,
17 a federal court must predict how the highest state court would decide the issue.” *Id.* at 1239.
18 Washington courts begin statutory interpretation with the statute’s “plain meaning,” which “‘is to
19 be discerned from the ordinary meaning of the language at issue, the context of the statute in
20 which that provision is found, related provisions, and the statutory scheme as a whole.’” *Lake v.*
21 *Woodcreek Homeowners Ass’n*, 243 P.3d 1283, 1288 (Wash. 2010) (quoting *State v. Engel*, 210
22 P.3d 1007, 1010 (2009)). “If the statute is unambiguous after a review of the plain meaning, the
23 court’s inquiry is at an end.” *Id.* The court must “bear in mind that ‘[a] statute, of course, is to
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1 be construed, if such a construction is fairly possible, to avoid raising doubts of its
2 constitutionality.’” *Ass’n of Nat. Advertisers, Inc. v. Lungren*, 44 F.3d 726, 729 (9th Cir. 1994)
3 (citing *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 (1981)).

4 Plaintiff’s argument that the Statute primarily bans speech is undermined by the clear
5 language of the regulation itself, which states that: “[a] person may not sell, offer for sale, or
6 otherwise make available a sexual assault kit.” Wash. Rev. Code § 5.70.070(2). The Statute’s
7 operative verbs—“sell,” “offer for sale,” and “make available”—contemplate transactional
8 conduct, i.e. the transfer of a sexual assault kit from one person to another, and not speech or
9 expression. *C.f. Williams*, 533 U.S. at 294. The Statute goes on to specify that a person may not
10 sell, offer for sale, or otherwise make available a sexual assault kit “[t]hat is marketed or
11 otherwise presented as over-the-counter, at-home, or self-collected” or “[i]f the person intends,
12 knows, or reasonably should know that the sexual assault kit will be used for the collection of
13 evidence of sexual assault other than by law enforcement or a health care provider.” Wash. Rev.
14 Code § 5.70.070(2). The first subsection (“marketed or otherwise presented”) identifies what
15 kinds of sexual assault kits are banned for sale based on the kit’s stated use (at-home evidence
16 collection). Wash. Rev. Code § 5.70.070(2)(a). In this way, the Statute appears analogous to the
17 FDA’s “use of a product’s marketing and labeling to discern to which regulatory regime a
18 product is subject.” *Nicopure Labs, LLC v. Food & Drug Admin.*, 944 F.3d 267, 282 (D.C. Cir.
19 2019) (citing *Whitaker v. Thompson*, 353 F.3d 947, 953 (D.C. Cir. 2004)).

20 The D.C. Circuit has held that “the FDA’s reliance on a seller’s claims about a product as
21 evidence of that product’s intended use, in order that the FDA may correctly classify the product
22 and restrict it if misclassified, does not burden the seller’s speech.” *Id.* at 283. For example, in
23 *Nicopure Labs*, an e-cigarette manufacturer and distributor challenged two provisions of the
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1 Tobacco Control Act (TCA) on First Amendment grounds—the premarket review pathway and
2 the free sample ban. The premarket review pathway classified products for regulation and
3 review based on “how the manufacturer describe[d] the product’s characteristics and intended
4 use.” *Nicopure*, 944 F.3d at 282. The plaintiff argued that this use of a manufacturer’s claims—
5 “such as the claim that the product is ‘safer than cigarettes’”—to assign the product to a review
6 pathway impermissibly burdened speech. *Id.* The court was “unpersuaded” by this argument.
7 *Id.* As the panel explained, “[j]ust as the government may consider speech that markets a copper
8 bracelet as an arthritis cure or a beach ball as a lifesaving flotation device in order to subject the
9 item to appropriate regulation, so, too, the FDA may rely on e-cigarette labeling and other
10 marketing claims in order to subject e-cigarettes to appropriate regulation.” *Id.* at 283.

11 Here, the Statute similarly uses the marketing speech accompanying a sexual assault kit
12 to subject the product to “appropriate regulation”—a ban on the sale or distribution of kits
13 intended for use in the self-collection of evidence following sexual assault under Washington
14 Revised Code § 5.70.070. *Id.* In both *Nicopure* and *Whitaker*, its predecessor case, the product
15 in question—like the sexual assault kits at issue here—could be lawfully sold if the substance
16 went “unaccompanied by the speech that characterized it.” *Nicopure*, 944 F.3d at 284. Just as
17 the “classification of a substance as a ‘drug’ turn[ed] on the nature of the claims advanced on its
18 behalf” in *Whitaker*, so too does the classification of a sexual assault kit as banned for sale turn
19 on whether it is “marketed or otherwise presented as over-the-counter.” *Whitaker v. Thompson*,
20 353 F.3d 947, 953 (D.C. Cir. 2004). This use of speech to determine whether the conduct of
21 selling the product as-labeled is unlawful “does not run afoul of the First Amendment.”
22 *Nicopure*, 944 F.3d at 284; *see also Whitaker*, 353 F.3d at 958 (citing *Wisconsin v. Mitchell*, 508
23 U.S. 476, 489 (1993)) (“the First Amendment allows ‘the evidentiary use of speech to establish
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the elements of a crime or to prove motive or intent”).² The *Nicopure* court further concluded that any commercial speech related to the sale of the product as labeled did not implicate the First Amendment, as “[i]t is well established that ‘commercial speech related to illegal activity’ is not subject to constitutional protection.” *Id.* (quoting *Central Hudson Gas & Electric Corp. v. Public Service Commission* 447 U.S. 557, 564 (1980)).

Notably, the First Circuit independently reached the same conclusion when considering a similar First Amendment challenge to a local ordinance that restricted flavored tobacco products. *See Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence, R.I.*, 731 F.3d 71 (1st Cir. 2013). The City of Providence’s so-called Flavor Ordinance established that it would be “unlawful for any person to sell or offer for sale any flavored tobacco product to a consumer” and provided that a “statement or claim made or disseminated by the manufacturer of a tobacco product . . . that such tobacco product has or produces a characterizing flavor shall constitute presumptive evidence that the tobacco product is a flavored tobacco product.” *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence*, No. CA 12-96-ML, 2012 WL 6128707 at *19 (D.R.I. Dec. 10, 2012), *aff’d sub nom. City of Providence*, 731 F.3d. Much like Plaintiff argues here, the plaintiffs in *City of Providence* claimed that the Flavor Ordinance’s “presumptively ban[ning] products based on what Plaintiffs say about them” violated their First Amendment rights. *City of Providence*, 2012 WL 6128707 at *7. But as the district court explained, “[t]he inclusion of a ‘public claim or statement made by the manufacturer’ to determine whether the described product falls under the definition of a ‘flavored tobacco product’ . . . does not amount

² Just as it is illegal for manufacturers to sell “saw palmetto” (an extract from the dwarf American palm) under the label that it treats benign prostatic hyperplasia, Leda and other manufacturers cannot sell a “kit” that is labeled for self-collection of evidence following a sexual assault. *See Whitaker*, 353 F.3d. at 233.

1 to a prohibition against speech.” *Id.* at *8. The definition of characterizing flavor “merely
2 serve[d] to explain which tobacco products fall under the prohibition.” *Id.* Likewise, subsection
3 2(a) of the Statute explains which sexual assault kits “fall under the prohibition”: those that are
4 “marketed or otherwise presented as over-the-counter, at-home, or self-collected or in any
5 manner that indicates that the sexual assault kit may be used for the collection of evidence of
6 sexual assault other than by law enforcement or a health care provider.” Wash. Rev. Code
7 § 5.70.070(2)(a). Thus, like the Flavor Ordinance, the Statute is an “an economic regulation of
8 the sale of a particular product” and not a regulation of speech. *City of Providence*, 2012 WL
9 6128707 at *7.

10 To the extent that the Statute may incidentally implicate speech, the speech is commercial
11 in nature. “[T]he core notion of commercial speech [is] speech which does no more than propose
12 a commercial transaction.” *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983) (quoting
13 *Va. State Bd. of Pharmacy*, 425 U.S. at 762) (internal quotations omitted). “Speech [can]
14 properly be characterized as commercial when (1) the speech is admittedly advertising, (2) the
15 speech references a specific product, and (3) the speaker has an economic motive for engaging in
16 the speech.” *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004) (citing
17 *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66–67 (1983)). The Ninth Circuit has
18 declined to limit the scope of commercial speech to “circumstances where clients pay for
19 services,” emphasizing that advertisements or marketing that is “placed in a commercial context
20 and directed at the providing of services rather than toward an exchange of ideas” qualifies as
21 commercial speech even if the solicitation is of a non-paying client base. *First Resort, Inc. v.*
22 *Herrera*, 860 F.3d 1263, 1273 (9th Cir. 2017). Likewise, commercial speech remains
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1 commercial even if it “contain[s] discussions of important public issues.” *Bolger*, 463 U.S. at
2 67–68.

3 The Statute prohibits “offering” sexual assault kits “for sale”— speech that “does no
4 more than propose a commercial transaction.” *Bolger*, 463 U.S. at 66. Even a hypothetical
5 “offer for sale” at no cost (free distribution of EEKs) would still explicitly “reference the
6 product” itself and be directed at the “provision of services”—services that are typically
7 provided so that the company can turn a profit. *Joseph*, 353 F.3d at 1006; *Herrera*, 860 F.3d, at
8 1263. This too meets the definition of commercial speech. To the extent that the marketing
9 language in subsection 2(a) burdens speech, it only does so if a person is selling a kit that is
10 “marketed or otherwise presented as over-the-counter”; critically, it is the sale or distribution of a
11 product meeting the description in 2(a) that triggers the statute. Thus, to the extent that the
12 Statute implicates speech, the speech is “‘linked inextricably’ with the commercial arrangement
13 that it proposes.” *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (quoting *Friedman v. Rogers*, 440
14 U.S. 1, 10, n. 9 (1979)).

15 The Supreme Court has developed a four-part test regarding the permissible regulation of
16 commercial speech. *Central Hudson*, 447 U.S. at 566. “At the outset” a court must determine
17 whether the expression is protected at all; “[f]or commercial speech to come within that
18 provision, it at least must concern lawful activity and not be misleading.” *Id.* This initial inquiry
19 is where the court in *City of Providence* ended its analysis, as the Ordinance itself “precluded
20 [Plaintiff] from selling flavored tobacco products in Providence” and thus any offer to sell the
21 product constituted an act proscribed by law. *City of Providence*, 2012 WL 6128707 at *8. As
22 the First Circuit panel emphasized in regard to a second Ordinance that was challenged in the
23 *City of Providence* suit (the Price Ordinance) “[h]ere, the ‘offers’ and other forms of allegedly
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1 commercial speech restricted by the Price Ordinance are offers to engage in unlawful activity;
2 that is, sales of tobacco products by way of coupons and multi-pack discounts, which are banned
3 by the Price Ordinance itself.” *City of Providence*, 731 F.3d at 78. Similarly, the *Nicopure* court
4 concluded that because “speech proposing an illegal transaction is speech which a government
5 may regulate or ban entirely . . . the FDA does not run afoul of the First Amendment when it
6 relies on manufacturer statements.” *Nicopure*, 944 F.3d at 284 (citing *Hoffman Estates*, 455 U.S.
7 at 496).

8 Likewise, the Statute explicitly forbids the sale or distribution of sexual assault kits for
9 use in the self-collection of evidence. Any “offer for sale” of an EEK thus constitutes an offer to
10 engage in an illegal transaction, and such speech is “categorically excluded from First
11 Amendment protection.” *Williams*, 553 U.S. at 297; *Levi Strauss & Co. v. Shilon*, 121 F.3d
12 1309, 1312 (9th Cir. 1997).³ In other words, the Statute lawfully prohibits offers to engage in the
13 very conduct that the Statute forbids. Furthermore, any marketing represents “commercial
14 speech related to illegal activity” if the company attempts to sell or otherwise make available the
15 kits that meet the statutory description. *Central Hudson*, 447 U.S. at 564. Otherwise, the Statute
16 does not restrict marketing or advertising of at-home sexual assault kits. Thus, the *Central*
17 *Hudson* inquiry must end before it properly begins, as any speech implicated by the statute
18 concerns illegal activity and is not protected. *See City of Providence*, 731 F.3d at 78.

21 ³ In evaluating a First Amendment challenge to a City of New York statute that banned the sale
22 of tobacco products below the listed price, a district court similarly concluded that “offers that
23 are restricted by the ordinance are offers to engage in an unlawful activity—namely, the sale of
24 cigarettes and tobacco products below the listed price. Thus, the ordinance lawfully prohibits
retailers from offering what the ordinance explicitly forbids them to do.” *Nat’l Ass’n of Tobacco
Outlets, Inc. v. City of New York*, 27 F. Supp. 3d 415, 423 (S.D.N.Y. 2014).

1 The caselaw Plaintiff relies on to argue that the Statute bans speech only further serves to
 2 distinguish the Statute from laws that do implicate the First Amendment. (*See* Dkt. No. 29 at 6–
 3 7.) For example, Plaintiff analogizes this case to *In re R.M.J.*, a matter that involved a restriction
 4 on the categories of information and forms of printed advertisement that lawyers in the State of
 5 Missouri could lawfully publish. *In re R. M. J.*, 455 U.S. 191, 193 (1982). Missouri’s regulation
 6 directly restricted a lawyer’s freedom to publish “truthful advertising related to lawful
 7 activities”—speech “entitled to the protections of the First Amendment.” *R.M.J.*, 455 U.S. at
 8 203. Here, the Statute does not restrict advertising or disseminating information about lawfully
 9 sold products; as Defendants point out, it only regulates what people and businesses “must
 10 do[,] . . . not what they may or may not say.” (Dkt. No. 18 at 17) (emphasis in original) (quoting
 11 *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60 (2006)). Plaintiffs may
 12 market EEKs in any way they choose so long as they do not *sell* them.⁴

13 Likewise, Plaintiff’s comparison to *Sorrell* is inapposite, as *Sorrell* involved a Vermont
 14 statute that prohibited the sale of information for marketing purposes but allowed the same
 15 information to be sold for “educational communications.” *Sorrell*, 564 U.S. at 564. Unlike a
 16 ban on the sale of sexual assault kits intended for at-home use, the product in question in *Sorrell*
 17 was information itself (which is “speech within the meaning of the First Amendment”). *Id.* at
 18 570. Accordingly, the regulation not only restricted the creation, dissemination, and use of
 19 speech, but also favored certain speakers (academic institutions) over others (marketers). *Id.* at
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21 ⁴ For the same reasons, this Statute is readily distinguishable from notable advertising cases, such
 22 as *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (prohibition on advertising
 23 prices of legal alcoholic beverages violated First Amendment) and *Va. State Bd. of Pharmacy v.*
 24 *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 750 (1976) (prohibition on pharmacists
 advertising information about legally prescribed prescription drugs violated First Amendment).
 The Statute does not regulate or restrict advertising—truthful or misleading—about at-home
 sexual assault kits, but rather bans selling or otherwise making such kits available.

571 (“So long as they do not engage in marketing, many speakers can obtain and use the information.”). In this way, the law imposed a “speaker and content based burden on protected expression” and did not survive heightened scrutiny. *Id.* Contrastingly, Washington has not banned “all speech about ‘sexual assault kits’ that describes them as self-collected” as Plaintiffs assert; it has banned the *sale* of sexual assault kits intended for at-home use. (Dkt. No. 29 at 7.) Any person in Washington state remains free to disseminate as much accurate *or* misleading information about sexual assault kits as they would like to whomever they would like—so long as that individual does not sell or otherwise make available sexual assault kits that fall under the prohibition in the Statute.

Having concluded that the Statute regulates commercial conduct, the Court briefly considers whether the “particular conduct possesses sufficient communicative elements to bring the First Amendment into play.” *Philip Morris USA v. City & Cnty. of San Francisco*, No. C 08-04482 CW, 2008 WL 5130460, at *2 (N.D. Cal. Dec. 5, 2008), *aff’d sub nom. Philip Morris USA, Inc. v. City & Cnty. of San Francisco*, 345 F. App’x 276 (9th Cir. 2009) (unpublished). Since “[e]very civil and criminal [regulation] imposes some conceivable burden on First Amendment protected activities,” conduct does not constitute protected speech whenever a person aims to communicate an idea. *Philip Morris*, 345 F. App’x at 276 (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706, (1986)). Instead, “a facial freedom of speech attack must fail unless, at a minimum, the challenged statute ‘is directed narrowly and specifically at expression or conduct commonly associated with expression.’” *Roulette v. City of Seattle*, 97 F.3d 300, 305 (9th Cir. 1996) (citing *City of Lakewood*, 486 U.S. at 760). For example, the Supreme Court “has recognized the expressive nature of students’ wearing of black armbands to protest American military involvement in Vietnam; of a sit-in by blacks in a ‘whites only’ area to

1 protest segregation; of the wearing of American military uniforms in a dramatic presentation
2 criticizing American involvement in Vietnam; and of picketing about a wide variety of causes.”
3 *Philip Morris*, 2008 WL 5130460, at *2 (citations omitted).

4 Plaintiff asserts that subsection 2(b) of the Statute regulates expressive conduct because it
5 “targets the intended message that accompanies the sale: that a common, otherwise-legal product
6 can be used by a survivor to-self collect evidence.” (Dkt. No. 29 at 6 n.3.) However, the Ninth
7 Circuit has found that consummating a business transaction and selling goods constitutes
8 nonexpressive conduct unprotected by the First Amendment, and Plaintiff fails to distinguish this
9 caselaw. *See, e.g., B&L Prods., Inc. v. Newsom*, 104 F.4th 108 (9th Cir. 2024); *Philip Morris*,
10 345 F. App’x at 276 (“[S]elling cigarettes isn’t [protected expressive activity] because it doesn’t
11 involve conduct with a significant expressive element It doesn’t even have an expressive
12 component.”). For example, *B&L* concerned a California statute that banned contracting for,
13 authorizing, or allowing the sale of firearms or ammunition on Del Mar Fairgrounds property.
14 *B&L Prods*, 104 F.4th at 111. The plaintiff asserted that the challenged statute specifically
15 targeted and “jeopardized the pro-gun speech that occurs at gun shows,” including information
16 sharing and educational activities. *B&L Prods*, 104 F.4th at 114. However, the court pointed out
17 that a “celebration of America’s gun culture . . . can still take place on state property, as long as
18 that celebration does not involve contracts for the sale of guns.” *Id.* at 114–115 (internal
19 quotations omitted). Thus, because “‘the only inevitable effect, and the stated purpose’ of [the]
20 statute [was] to regulate nonexpressive conduct,” the court concluded that “our inquiry is
21 essentially complete.” *Id.* at 116 (quoting *HomeAway.com, Inc.*, 918 F.3d at 685.) So too here.
22 The only inevitable effect and the stated purpose of the Statute is to regulate nonexpressive
23 conduct—the sale of sexual assault evidence collection kits for at home use. Leda can continue
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1 to “celebrate” its message that survivors can self-collect evidence of sexual assault using a
2 certain product, so long as that celebration does not involve the sale of EEKs.

3 The *Nicopure* court’s commentary is also instructive on this point. Much like Plaintiff
4 asserts that an “intended message [] accompanies the sale” of an EEK (Dkt. No. 29 at 6 n.3),
5 Nicopure argued that providing free samples was “‘expressive’ because they convey[] important
6 information to smokers who want to switch to vapor products, including key consumer
7 information[.]” *Nicopure*, 944 F.3d at 291 (internal quotations removed). The court noted that
8 “[t]his extraordinary argument, if accepted, would extend First Amendment protection to every
9 commercial transaction on the ground that it ‘communicates’ to the customer ‘information’ about
10 a product or service.” *Id.* However, as the *Nicopure* court emphasized, “the Supreme Court has
11 long rejected the ‘view that an apparently limitless variety of conduct can be labeled ‘speech’
12 whenever the person engaging in the conduct intends thereby to express an idea.’” *Id.* (citing
13 *United States v. O’Brien*, 391 U.S. 367, 376 (1968)). Thus, the court found that “the seller’s
14 intention that those experiences leave consumers with helpful information that encourages future
15 purchases does not convert all regulation that affects access to products or services into speech
16 restrictions subject to First Amendment scrutiny.” *Id.* The same can be said for Plaintiff’s stated
17 intention that its sale or distribution of an EEK imparts information: that intent does not
18 transform the transaction into expressive conduct that implicates the First Amendment. *Id.*

19 Accordingly, Plaintiff has failed to allege a facial First Amendment violation as a matter
20 of law and this claim would not succeed on the merits. *See Winter*, 555 U.S. at 20. Thus,
21 because Plaintiff’s only argument on irreparable harm is premised on the likely success on the
22 merits of its constitutional claims, Plaintiff does not establish a likelihood of irreparable harm on
23 this claim. (*See* Dkt. No. 10 at 26.)

1 2. As-Applied First Amendment Claim

2 Plaintiff asserts that the Statute “has been unconstitutionally applied to Leda Health
3 because it was designed with it in mind” and “[t]he Legislature specifically targeted Leda Health
4 through the Statute.” (Dkt. No. 10 at 20.) To support this argument, Plaintiff states “it is telling
5 that Representative Mosbrucker specifically referenced Leda Health” in email communications
6 about House Bill 1564. (*Id.*)

7 Just as the facial impact of a statute may render it unconstitutional, if a statute’s “stated
8 purpose” is to suppress specific speech or ideas, a court may consider that purpose in
9 determining the constitutionality of the regulation. *Sorrell*, 564 U.S. at 565–566. However,
10 “[t]he Supreme Court has disclaimed the idea that ‘legislative motive is a proper basis for
11 declaring a statute unconstitutional’ in the absence of a direct impact on protected speech.” *B&L*
12 *Prods., Inc.* 104 F.4th at 116 (citing *United States v. O’Brien*, 391 U.S. 367, 383–84 (1968)).
13 Thus, when “the only inevitable effect, and the stated purpose of a statute is to regulate
14 nonexpressive conduct,” a “court may not conduct an inquiry into legislative purpose or motive
15 beyond what is stated within the statute itself.” *Id.* at 116 (internal citations omitted); *see also*
16 *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685 (9th Cir. 2019). Because the
17 stated purpose of the Statute is “prohibiting the sale of over-the-counter sexual assault kits” and
18 the statute does not directly impact protected speech (*see supra* Section III.B.1), this Court may
19 not further inquire into the legislature’s motives. (Dkt. No. 19-1 at 3.) Thus, Plaintiff would not
20 succeed on the merits of its as-applied First Amendment claim, as the Statute does not target
21 Plaintiff’s expression of ideas—rather, it prohibits specific non-expressive conduct exemplified
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1 by Plaintiff's business model.⁵ And because Plaintiff's only argument on irreparable harm is
 2 likely success on the merits, Plaintiff likewise cannot establish a likelihood of irreparable harm
 3 on this claim. (*See* Dkt. No. 10 at 26).⁶

4 3. Overbreadth and Vagueness Claims

5 "According to our First Amendment overbreadth doctrine, a statute is facially invalid if it
 6 prohibits a substantial amount of protected speech." *Williams*, 553 U.S. at 292. "Courts
 7 vigorously enforce[] the requirement that a statute's overbreadth be *substantial*, not only in an
 8 absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.* (emphasis in
 9 original). Here, Plaintiff fails to make out an overbreadth claim as a matter of law because the
 10 Statute does not regulate protected speech, let alone prohibit "a substantial amount of protected
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14 ⁵ As the Ninth Circuit commented in *Philip Morris*, "[t]he censorial motive plaintiff attributes to
 15 defendants is always present when the government restricts the sales of a product." *Philip*
Morris, 345 F. App'x at 276. That alone "can't be sufficient" to raise First Amendment
 concerns, the court found. *Id.*

16 ⁶ Additionally, Leda's claims about its EEKs would not be necessary for prosecution under the
 17 Statute because Leda separately meets the scienter requirement of subsection 2(b). *See* Wash.
 18 Rev. Code § 5.70.070(2) ("A person may not sell . . . a sexual assault kit if it is marketed . . . as
 19 over-the-counter . . . or [i]f the person intends, knows, or reasonably should know that the sexual
 20 assault kit will be used for the collection of evidence of sexual assault other than by law
 21 enforcement or a health care provider") (emphasis added). Leda asserts that the Statute "does
 22 not punish the sale of a 'sexual assault kit' unless the seller describes it as 'over-the-counter,' 'at-
 23 home,' or 'self-collected.'" (Dkt. No. 29 at 5.) Yet this characterization conspicuously omits
 24 subsection 2(b), which establishes that regardless of how a kit is marketed, it cannot be legally
 sold if the manufacturer *intends* that it be used for at-home evidence collection. Wash. Rev. Code
 § 5.70.070(2). Thus, the Statute prohibits the sale of *Leda's* EEK's no matter how they are
 labeled or marketed, because Leda affirmatively states that its "EEKs *are* intended for at-home
 use [and] EEKs *are* for self-collection of evidence" (Dkt. No. 10 at 18) (emphasis in original).
 In this way, although a hypothetical retailer could perhaps sell sexual assault kits "in blank
 packaging," (Dkt. No. 29 at 3), Leda itself could not. Thus, even assuming *arguendo* that
 subsection 2(a) implicates some speech, Leda's speech about the EEKs is likely superfluous for
 the purposes of prosecution.

1 speech.” *Id.*; see *supra* Section III.B.1.⁷ Moreover, “the overbreadth doctrine does not apply to
2 commercial speech.” *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 497
3 (1982). Therefore, even if the Statute incidentally burdens speech, the overbreadth doctrine
4 would remain inapplicable. See *supra* Section III.B.1 (finding that to the extent that the Statute
5 implicates speech, the speech is commercial in nature). Accordingly, Plaintiff’s overbreadth
6 claims would not succeed on the merits.

7 “A law that does not reach constitutionally protected conduct and therefore satisfies the
8 overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due
9 process.” *Vill. of Hoffman*, 455 U.S., at 497. “A conviction fails to comport with due process if
10 the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice
11 of what is prohibited, or is so standardless that it authorizes or encourages seriously
12 discriminatory enforcement.” *Williams*, 533 U.S. at 304. In the First Amendment context,
13 courts allow plaintiffs to argue that a statute is vague if it “is unclear whether [the statute]
14 regulates a substantial amount of protected speech.” *Id.* When considering a vagueness
15 challenge, a court should first “examine the facial vagueness challenge and, assuming the
16 enactment implicates no constitutionally protected conduct, should uphold the challenge only if
17 the enactment is impermissibly vague in all of its applications.” *Vill. of Hoffman*, 455 U.S., at
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19 ⁷ Plaintiff asserts that “banning any person from discussing self-collected sexual assault kits
20 sweeps vast amounts of constitutionally protected speech within its reach” and in so doing causes
21 companies like Leda to “to steer far wider of the unlawful zone than if the boundaries of the
22 forbidden areas were clearly marked.” (Dkt. No. 10 at 21) (quoting *Grayned v. City of Rockford*,
23 408 U.S. 104, 109 (1972)). However, as discussed *supra*, the Statute does not ban the *discussion*
24 of anything; it prohibits selling, offering to sell, or otherwise making available sexual assault kits
intended for at-home use. Wash. Rev. Code § 5.70.070(2). Thus, the Statute regulates
transactional conduct, not speech. And to the extent speech is implicated by the proscription on
offers to sell, the speech in question is not protected, as it constitutes a “proposal to engage in
illegal activity.” *Williams*, 533 U.S. at 298.

1 495.⁸ Thus, the Court must “examine the complainant’s conduct before analyzing other
2 hypothetical applications of the law” because “[a] plaintiff who engages in some conduct that is
3 clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of
4 others.” *Id.*

5 Plaintiff argues that “[i]t is unclear what behavior the Statute proscribes by barring
6 speech that ‘otherwise makes available’ sexual assault kits.” (Dkt. No. 10 at 21) (quoting Wash.
7 Rev. Code § 5.70.070(2)). The canon of construction *ejusdem generis* counsels that “where
8 general words follow specific words in a statutory enumeration, the general words are construed
9 to embrace only objects similar in nature to those objects enumerated by the preceding specific
10 words.” *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*,
11 537 U.S. 371, 384 (2003) (internal quotation marks omitted). Relatedly, “we rely on the
12 principle of *noscitur a sociis*—a word is known by the company it keeps—to ‘avoid ascribing to
13 one word a meaning so broad that it is inconsistent with its accompanying words’” in construing
14 the meaning of a term in a statute. *Yates v. United States*, 574 U.S. 528, 543 (2015) (quoting
15 *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)). Here, the phrase “otherwise make available”
16 follows the more specific terms “sell” and “offer for sale.” Wash. Rev. Code § 5.70.070(2).
17 Read in conjunction with the verbs that precede it, “otherwise make available” encompasses
18 actions related to selling and offering for sale—such as the distribution of free samples. It is not
19 uncommon for statutes that proscribe conduct to include a final, catch-all term with the word
20 “otherwise,” and courts consistently rely on these canons to determine what acts are covered by
21 that statutory phrase. *See, e.g., Yates* 574 U.S. at 545 (quoting *Begay v. United States*, 553 U.S.

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23 ⁸ “[V]agueness challenges to statutes which do not involve First Amendment freedoms must be
24 examined in the light of the facts of the case at hand.” *United States v. Mazurie*, 419 U.S. 544
(1975).

1 137, 142–143 (2008) (“[W]e relied on this principle to determine what crimes were covered by
2 the statutory phrase ‘any crime ... that ... is burglary, arson, or extortion, involves use of
3 explosives, or otherwise involves conduct that presents a serious potential risk of physical injury
4 to another,’ 18 U.S.C. § 924(e)(2)(B)(ii). The enumeration of specific crimes, we explained,
5 indicates that the ‘otherwise involves’ provision covers ‘only *similar* crimes, rather than *every*
6 crime that ‘presents a serious potential risk of physical injury to another.’”). Thus, read
7 alongside the other operative verbs in the statute, the phrase “otherwise makes available” is
8 sufficiently clear to guard against arbitrary or discriminatory enforcement.

9 Plaintiff further asserts that the phrase “in any manner that indicates” is
10 unconstitutionally vague. (Dkt. No. 10 at 22) (quoting Wash. Rev. Code § 5.70.070(2)(a)).
11 However, this term is similarly scrutable when read alongside the “neighboring words with
12 which it is associated.” *Williams*, 553 U.S. at 294. The Statute prohibits the sale of a sexual
13 assault kit “[t]hat is marketed or otherwise presented as over-the-counter, at-home, or self-
14 collected or in any manner that indicates that the sexual assault kit may be used for the collection
15 of evidence of sexual assault other than by law enforcement or a health care provider.” Wash.
16 Rev. Code § 5.70.070(2). Taken in context, “in any manner” is a general term that we construe
17 to “embrace only objects similar in nature to those objects enumerated by the preceding specific
18 words”: “over-the-counter,” “at-home,” and “self-collected.” *Keffeler*, 537 U.S. at 384.
19 Accordingly, it is not a vague phrase but rather refers to ways in which a sexual assault kit might
20 be described to connote the intended use of evidence collection outside a medical or law
21 enforcement setting. As Defendants suggest, “a sexual assault kit presented as do-it-yourself or
22 self-test would [predictably] fall within the bounds of [the Statute].” (Dkt. No. 30 at 27.) “It is
23 not the case that the [Statute’s] criteria lack any ascertainable standard for inclusion and
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1 exclusion, nor do they contain no guidelines, such that the authorities can arbitrarily prosecute
 2 one class of [persons] instead of another.” *Kashem v. Barr*, 941 F.3d 358 at 370, 374 (9th Cir.
 3 2019) (internal quotation and citations omitted).⁹ A person of ordinary intelligence reading the
 4 Statute would glean fair notice of what conduct is prohibited.

5 Because “it is clear what the statute proscribes ‘in the vast majority of its intended
 6 applications,’” Plaintiff’s vagueness claim fails as a matter of law and would not succeed on the
 7 merits. *California Tchrs. Ass’n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001)
 8 (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000)). Likewise, any as-applied challenge must
 9 also fail, as the language of the Statute gives “*these plaintiffs* [] fair notice that *[their] conduct*
 10 would raise suspicion under the criteria” and does not “vest the government with unbridled
 11 enforcement discretion” as applied to Leda Health. *Kashem*, 941 F.3d at 370 (emphasis in
 12 original). And because Plaintiff’s only argument on irreparable harm is likely success on the
 13 merits, Plaintiff fails to establish a likelihood of irreparable harm on its vagueness and
 14 overbreadth claims. (*See* Dkt. No. 10 at 26.)

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 16
 17 ⁹ Plaintiff also argues that the term “marketed or otherwise presented” is “unconstitutionally
 18 vague because it offers no means of differentiating truthful speech from false or misleading
 19 speech in that process.” (Dkt. No. 29 at 10). However, as described *supra*, the term “marketed
 20 or otherwise presented” does not regulate speech but rather uses the marketing claims advanced
 21 on behalf of a sexual assault kit to identify whether it is subject to regulation under the Statute.
 22 *See Nicopure* 944 F.3d at 283 (“the FDA’s reliance on a seller’s claims about a product as
 23 evidence of that product’s intended use, in order that the FDA may correctly classify the product
 24 and restrict it if misclassified, does not burden the seller’s speech”); *City of Providence*, 2012
 WL 6128707 at *8 (“the inclusion of a ‘public claim or statement made by the manufacturer’ to
 determine whether the described product falls under the definition of a ‘flavored tobacco
 product’ . . . does not amount to a prohibition against speech.”). The statute does not proscribe
 any marketing or promotion of sexual assault kits; it prohibits the sale of sexual assault kits
 intended for at home use. A person may freely promote the benefits of at home evidence
 collection kits; what they may not do is sell kits for at home evidence collection. *See Nicopure*
 944 F.3d at 283; *Whitaker*, 353 F.3d at 958.

1 4. Bill of Attainder Claim

2 The Constitution instructs: “No Bill of Attainder . . . shall be passed.” U.S. Const. art.
3 I, § 9, cl. 3. “[A] law that legislatively determines guilt and inflicts punishment upon an
4 identifiable individual without provision of the protections of a judicial trial” is a bill of
5 attainder. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 468 (1977). The Bill of Attainder
6 Clause is “an important ingredient of the doctrine of ‘separation of powers,’” as it prevents
7 legislatures from stepping into the judicial role, or “ruling upon the blameworthiness of, and
8 levying appropriate punishment upon, specific persons.” *Id.* at 649. “Three key features brand a
9 statute a bill of attainder: that the statute (1) specifies the affected persons, and (2) inflicts
10 punishment (3) without a judicial trial.” *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d
11 662, 669 (9th Cir. 2002). This tripartite test is not disjunctive, meaning all three elements must
12 be met. *Nixon*, 433 U.S. at 648 (“[T]he fact that [a statute] refers to [a plaintiff] by name [] does
13 not automatically offend the Bill of Attainder Clause.”). “Only the clearest proof suffices to
14 establish the unconstitutionality of a statute as a bill of attainder.” *SeaRiver*, 309 F.3d at 669. In
15 examining the Statute’s constitutionality, the Court “may only look to its terms, to the intent
16 expressed by Members of Congress who voted its passage, and to the existence or nonexistence
17 of legitimate explanations for its apparent effect.” *Nixon*, 433 U.S. at 484.

18 The Supreme Court has established a set of “guideposts” for “determining whether
19 legislation singles out a person or class within the meaning of the Bill of Attainder Clause.”
20 *SeaRiver*, 309 F.3d at 669. “First, we look to whether the statute or provision explicitly names
21 the individual or class, or instead, describes the affected population in terms of general
22 applicability.” *Id.* Second, the court assesses “whether the identity of the individual or class was
23 ‘easily ascertainable’ when the legislation was passed.” *Id.* (quoting *Brown*, 381 U.S. at 448–

49). Third, the court examines “whether the legislation defines the individual or class by “past conduct [that] operates only as a designation of particular persons”” and evaluates whether the past conduct consists of “irrevocable acts committed by them.” *Id.* (quoting *Selective Serv. Sys.*, 468 U.S. at 847–848); *see also Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 86 (1961). The guideposts are intended to be considered holistically. *SeaRiver*, 309 F.3d at 669.

Plaintiff asserts that Leda Health is the “easily ascertainable” target of the Statute because “Legislators openly discussed Leda Health when drafting and voting for the bill”; Leda was the only company to testify at the Bill hearing; Leda was the only company in Washington selling sexual assault kits at the time the Statute passed; and one sponsor of the Bill “posted online that her Bill was designed to stop Leda Health from operating in Washington.” (Dkt. Nos. 10 at 24, 1 at 6.) For the purposes of the foregoing analysis, the Court accepts these factual allegations as true. Plaintiff further argues that the Statute “singled out” Leda Health for attainder based on past conduct (selling EEKs). *Id.*, *see SeaRiver*, 309 F.3d at 669.

As an initial matter, the Statute does not reference Leda Health by name; instead, it is widely applicable to any person who engages in prohibited conduct. This cuts against a finding that Plaintiff was singled out. *SeaRiver*, 309 F.3d at 670. And although the hearing testimony and statements of certain legislators made it clear that the bill would apply to Leda Health, that application depended entirely on Leda’s choosing to *continue* selling EEKs after the Statute passed (which Leda did not). Thus, the Statute does not set forth a rule based on irreversible past conduct like the commission of a felony, rather, it attaches only if a person engages in generally prohibited activities. *United States v. Munsterman*, 177 F.3d 1139, 1142 (9th Cir. 1999); *see also Communist Party*, 367 U.S. at 86 (finding the law was not a bill of attainder because it

1 “attache[d] not to specified organizations but to described activities in which an organization
2 may or may not engage”). As in *Communist Party*, “[f]ar from attaching to the past and
3 ineradicable actions of an organization, the application of the [Statute] is made to turn upon []
4 contemporaneous fact”—whether a company is selling, offering for sale, or otherwise making
5 available sexual assault kits for at home use. *Communist Party*, 367 U.S. at 87. This
6 “prospective and generalized effect” cuts against a finding that Leda Health has been “singled
7 out” for attainder; unlike laws found to constitute bills of attainder, the Statute neither limits its
8 application to Plaintiffs nor prevents them from conforming their conduct with law. *SeaRiver*,
9 309 F.3d at 671; *c.f. United States v. Lovett*, 328 U.S. 303, 314–316 (1946) (finding that an
10 appropriations bill that prohibited the compensation of three named three federal employees
11 based on what Congress believed to be their political beliefs constituted a bill of attainder).

12 Courts are clear that “[a]n otherwise valid law is not transformed into a bill of attainder
13 merely because it regulates conduct on the part of designated individuals or classes of
14 individuals.” *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 727 (9th Cir.
15 1992). As the Seventh Circuit once highlighted, the fact “[t]hat the plaintiffs were the target, and
16 so far appears the *only target*” of legislation “does not establish that the [legislation] was not a
17 bona fide legislative measure” because “[i]t is utterly commonplace for legislation to be incited
18 by concern over one person or organization.” *LC&S, Inc. v. Warren Cnty. Area Plan Comm’n*,
19 244 F.3d 601, 604 (7th Cir. 2001) (emphasis added). Here, it is not disputed that the Washington
20 Statute “was incited by concern over one organization”—Leda Health. But the Statute “applies
21 to a class of activity only.” *Communist Party*, 367 U.S. at 88. As the Supreme Court warned in
22 *Nixon*, the argument that “an individual or defined group is attainted whenever he or it is
23 compelled to bear burdens which the individual or group dislikes would cripple the very
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1 process of legislating, for any individual or group that is made the subject of adverse legislation
2 can complain[.]” *Nixon*, 433 U.S. at 470. Ultimately, while Leda’s business may have
3 singularly inspired legislative action, it was not “singled out” within the meaning of the Bill of
4 Attainder Clause.

5 Furthermore, even if Leda Health had been “singled out,” the Statute is not a bill of
6 attainder because it does not inflict legislative punishment but rather furthers a legitimate
7 legislative purpose. “Three inquiries determine whether a statute inflicts punishment on the
8 specified individual or group: “(1) whether the challenged statute falls within the historical
9 meaning of legislative punishment; (2) whether the statute, ‘viewed in terms of the type and
10 severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes’;
11 and (3) whether the legislative record ‘evinces a congressional intent to punish.’” *SeaRiver*, 309
12 F.3d at 673 (quoting *Selective Serv. Sys. v. Minnesota Pub. Int. Rsch. Grp.*, 468 U.S. 841, 852
13 (1984)). A statute need not meet all three factors to constitute a bill of attainder; rather, courts
14 weigh each inquiry. *Id.* However, “if [an Act] furthers a nonpunitive legislative purpose, it is
15 not a bill of attainder.” *Id.* at 674. Accordingly, the second factor is dispositive insofar as a
16 finding of legitimate legislative purpose defeats a bill of attainder claim. *Id.*; see also *Nixon*, 433
17 U.S. at 475.

18 “Traditionally, bills of attainder sentenced the named individual to death, imprisonment,
19 banishment, the punitive confiscation of property by the sovereign, or erected a bar to designated
20 individuals or groups participating in specified employments or vocations.” *SeaRiver*, 309 F.3d
21 at 662. The Statute evinces none of these forms of punishment. Although Plaintiff argues that it
22 was “banished” from Washington, the Statute’s prohibition on selling sexual assault kits does not
23 fall within the historical meaning of “banishment,” which “has traditionally been associated with
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1 deprivation of citizenship, and does more than merely restrict one’s freedom to go or remain
 2 where others have the right to be: it often works a destruction of one’s social, cultural, and
 3 political existence.” *SeaRiver*, 309 F.3d at 673 (internal quotations omitted). Moreover, as
 4 Defendants point out, “Leda also offers STI testing, toxicology screenings, educational
 5 workshops, and emergency contraceptives; passage of HB 1564 does not prevent Leda from
 6 offering these other services to Washingtonians.” (Dkt. No. 18 at 29.)

7 Finally, the Statute “reasonably can be said to further nonpunitive legislative purposes.”
 8 *Nixon*, 433 U.S. at 475. Indeed, as in *Fresno Rifle*, “[t]here is no indication that the Legislature’s
 9 motivation was anything other than a legitimate desire to protect the safety and welfare of the
 10 citizens of [Washington].” *Fresno Rifle*, 965 F.2d at 728. The legislature’s stated purpose was
 11 “to support survivors of sexual offenses through building victim centered, trauma-informed
 12 systems that promote successful investigations and prosecutions of sexual offenses” and protect
 13 survivors from the potentially harmful impact of “over-the-counter sexual assault kits.” (Dkt.
 14 No. 19-1 at 3). And although Plaintiff disagrees with the legislature’s way of achieving this aim,
 15 it offers no evidence that the legislature was motivated by an improper desire to *punish* Leda
 16 Health rather than proscribe *conduct* brought to its attention by Leda’s business model.¹⁰ As

18 ¹⁰ Plaintiff’s reliance on *Lovett* is misplaced. The Statute in *Lovett* “clearly accomplishe[d] the
 19 punishment of named individuals without a judicial trial,” as the act “specifically cut[] off the
 20 pay of certain named individuals found guilty of disloyalty” and prevented them from engaging
 21 in future government work “because of what Congress thought to be their political beliefs.”
 22 *Lovett*, 328 U.S. at 316, 314. The Act was a consummate example of trial by the judiciary: “No
 23 one would think that Congress could have passed a valid law, stating that after investigation it
 24 had found Lovett, Dodd, and Watson ‘guilty’ of the crime of engaging in ‘subversive activities,’
 defined that term for the first time, and sentenced them to perpetual exclusion from any
 government employment.” *United States v. Brown*, 381 U.S. 437, 449 (1965). Contrastingly,
 this Statute does not resemble a “special legislative act[] which take[s] away the life, liberty, or
 property of particular named persons, because the legislature thinks them guilty[.]” *Lovett*, 328
 U.S. at 317.

1 Defendant points out, the public hearing testimony of prosecutors, healthcare workers, advocates
2 for sexual assault victims was largely focused on what sexual assault evidence collection entails
3 and the potential harm posed by products like EEKs—not on Leda Health. Moreover, exchanges
4 made during the hearings suggested that one of the reasons that Legislature opted to pass a law
5 rather than rely on the cease-and-desist letter to Leda Health was because of its concern with
6 protecting survivors from *other* companies that sell at-home sexual assault evidence collection
7 kits.¹¹ In this way, “the legislative record is probative of nonpunitive intentions.” *SeaRiver*, 309
8 F.3d at 676. Ultimately, because the Statute “furthers a nonpunitive legislative purpose, it is not
9 a bill of attainder.” *SeaRiver*, 309 F.3d at 674.

10 Accordingly, Plaintiffs would not succeed on this claim; even construing all factual
11 disputes in Plaintiff’s favor, Plaintiff does not feasibly “establish the unconstitutionality of
12 [the] [S]tatute as a bill of attainder.” *SeaRiver*, 309 F.3d at 669. As Plaintiff’s only argument on
13 irreparable harm is based on likely success on the merits, Plaintiff fails to establish a likelihood
14 of irreparable harm absent a preliminary injunction. (*See* Dkt. No. 10 at 26.)

15 **C. Remaining Factors**

16 To obtain a preliminary injunction, a plaintiff “must establish that he is likely to succeed
17 on the merits [and] that he is likely to suffer irreparable harm in the absence of preliminary
18 relief[.]” *Winter*, 555 U.S. at 20. Because the Court has found that Plaintiff’s constitutional
19 arguments fail as a matter of law and there is no risk of irreparable harm to Plaintiff absent an
20

21
22 ¹¹ *See* Hr’g Before H. Comm. on Community Safety, Justice, & Reentry (Wash. Feb. 7, 2023), at
23 1:18:40–2:12:14, video recording by TVW, <https://tvw.org/video/house-community-safety-justice-reentry-2023021199/?eventID=2023021199>. The Court notes that both Plaintiff and
24 Defendant cited video hyperlinks to this hearing in footnotes rather than following the proper
procedure of admitting an official transcript or thumb drive of the video into evidence.

1 injunction, Plaintiff's motion must be denied. The Court need not reach the remaining factors of
2 public interest and balance of the equities.

3 IV MOTION TO DISMISS

4 A. Legal Standard

5 To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient
6 factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft*
7 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
8 (2007)). "A claim has facial plausibility when the [complaint] pleads factual content that allows
9 the court to draw the reasonable inference that the defendant is liable for the misconduct
10 alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). When considering a motion to dismiss for
11 failure to state a claim, the Court must accept as true all well-pleaded factual allegations and
12 construe the allegations in favor of the non-moving party. *See Wood v. City of San Diego*, 678
13 F.3d 1075, 1080 (9th Cir. 2012). The Court does not have to accept conclusory, legal
14 assertions. *Iqbal*, 556 U.S. at 678. At the preliminary injunction stage, a plaintiff bears "a
15 heavier burden than . . . in pleading the plausible claim necessary to avoid dismissal." *New Hope*
16 *Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 165 (2d Cir. 2020).

17 B. Discussion

18 The merits of Plaintiff's First Amendment claims fail as a matter of law and not based on
19 the plausibility of Plaintiff's factual allegations. Even construing the facts in the light most
20 favorable to Plaintiff, the Statute does not regulate protected speech for the reasons described
21 *supra*. Instead, it burdens only non-expressive conduct. Thus, Plaintiff does not successfully
22 plead a facial or as-applied First Amendment violation and the first two claims in its Complaint
23 must fail. Similarly, as discussed *supra*, Plaintiff fails to plead cognizable overbreadth and
24


vagueness claims. The Court’s conclusions that these claims fail as a matter of law does not change when construing the factual allegations in Plaintiff’s favor. Finally, the Court found *supra* that even construing all Plaintiff’s factual allegations as true, the Statute did not plausibly constitute an unconstitutional bill of attainder. Plaintiff did not “carr[y] its burden, as the ‘one who complains of being attainted,’ of establishing ‘that the legislature’s action constituted punishment and not merely the legitimate regulation of conduct.’” *SeaRiver*, 309 F.3d 662 at 694 (quoting *Nixon*, 433 U.S. at 476 n. 40). Thus, this final claim likewise fails under the 12(b)(6) standard.¹²

Accordingly, Defendants’ motion to dismiss Plaintiff’s Complaint is GRANTED.

V CONCLUSION

For the reasons stated above, Plaintiff’s motion for preliminary injunctive relief (Dkt. No. 10) is DENIED. Plaintiff’s motion for an evidentiary hearing (Dkt. No. 34) is likewise DENIED as moot, and thus Defendants’ surreply (Dkt. No. 40) is also moot. Defendants’ motion to dismiss Plaintiff’s claims (Dkt. No. 30) is GRANTED. Plaintiff’s claims are dismissed with prejudice.

Dated this 21st day of October, 2024.



 David G. Estudillo
 United States District Judge

¹² The Court does not reach Defendants’ argument that the Eleventh Amendment bars Plaintiff’s claim against Governor Inslee, as the Court’s finding that all of Plaintiff’s claims fail as a matter of law effectively moots the immunity inquiry. (See Dkt. No. 30 at 15.)